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No. 84-952

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JULIUS M. GERZOF,

Appellant,

—against—

THE GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

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JULIUS M. GERZOF,
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-against-

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APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

INTRODUCTORY STATEMENT

This Brief is submitted on behalf of appellant, Julius M. Gerzof, to respond to "Appellee's Brief in Opposition to Jurisdictional Statement and Petition for Writ of Certiorari" which the Court may be treating as a motion to dismiss.*

ARGUMENT

A. The Court has Jurisdiction of this Appeal from the final judgment of the New York Court of Appeals Pursuant to 28 U.S.C. §1257(2).

Appellee does not assert that this case is not properly before the Court. No suggestion is made that any of appellant's Due Process or Equal Protection challenges to New York Judiciary Law §90 (McKinney, 1983) and the Second Department Rules promulgated pursuant thereto were not duly

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* On telephone inquiry, the Clerk's Office staff reported that appellee's submission would be treated as a motion to dismiss.

raised at every appropriate stage of the state court proceeding.

The Court has recognized that a state court may not avoid deciding federal questions and thus defeat jurisdiction of the Court. See, e.g. Wolfe v. State of North Carolina, 364 U.S. 177, 185 (1960). In analogous situations, the Court has entertained appeals from state courts of last resort which, although not considering appeals after full briefing, have rejected them for want of "debatable" constitutional questions. See e.g. Titus v. Wallick, 306 U.S. 282 (1939); Matthews v. Huwe, 269 U.S. 262 (1925). Here, the New York Court of Appeals dismissed appellant's appeal on the ground that "no substantial constitutional question is directly involved." See, Appendix to Appellant's Jurisdictional Statement, p. 1a. Thus, as in Titus, supra, and Matthews, supra, this Court has jurisdiction.

Under New York law (see, Judiciary Law §90 (4); New York Constitution Art. 6, §3), in attorney discipline cases, an appeal to the New York Court of Appeals from a final order of the Appellate Division lies as a matter of right only where there is directly involved the construction of the Constitution of the United States (and in one other circumstance not relevant herein).

When the New York Court of Appeals dismissed appellant's appeal on the ground that no substantial constitutional question was directly involved (see Appendix, p. 1a), its action constituted an affirmance of the Appellate Division's order of disbarment (see Appendix, p. 9a), which order (and its underlying opinion) rejected, sub silentio, appellant's federal constitutional claims. Thus, this appeal properly lies from the Court of Appeals' order. See, Stern and Gressman,

Supreme Court Practice, (5th ed. 1978), §3.22, p. 206; see also, Tumey v. State of Ohio, 273 U.S. 510, 515 (1927).

B. Appellant has raised his federal constitutional objections at the earliest point in the proceeding below and has preserved those objections throughout the course of the proceedings in the state court.

Appellee does not, in its motion to dismiss, directly assert that appellant has failed to raise duly any of the constitutional claims he has asserted in his Jurisdictional Statement. Appellee does, however, state:

> "Now the appellant challenges the constitutionality of Judiciary Law §90 and 22 NYCRR Part 691 as he had previously done in 1974 through 1976 . . ." Appellees' Brief, p. 5.

Certainly, the word "now" in that sentence was not intended to mean "in this Court, for the first time." Appellee well knows, and the record amply demonstrates that

appellant raised his federal constitutional claims, not only in his answer to the "Charges" filed, against him, but in motion practice in the Appellate Division even prior to the formal commencement of the disciplinary proceeding. The constitutional objections were preserved throughout the proceeding below and on appeal to the New York Court of Appeals. Thus, the constitutional questions are properly presented to the Court for determination.

C. The Constitutional questions are substantial.*

At least since Graham v. Richardson, 403 U.S. 365 (1971) was decided, it has been clear that labels such as "right" and "privilege" are not dispositive in

*The issues discussed herein are intended to demonstrate examples of the substantiality of appellant's claims; they do not constitute a narrowing of appellant's constitutional claims as set forth in his Jurisdictional Statement.

determining whether due process must be afforded before an individual is deprived of certain interests. Among those protected interests is the practice of law. See, e.g. Ex parte Garland, 4 Wall. 333, 379 (1866); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); In re Ruffalo, 390 U.S. 544 (1968).

Assuming, arguendo, that the right to practice law is classified as a "property" interest rather than a "liberty" interest, it is clear that it is a right which exists by virtue of state law. See, Judiciary Law §§90(1) (a), 460 et seq.; NY Civil Practice Law & Rules §§9401 et seq. (McKinney 1981); 22 NYCRR §§ 520, 690 (Second Department). As such, procedural due process governs any attempt by the state to deny, limit or revoke the right of one qualified, to practice law. One additional factor is present in this case: appellant had previously been subject to a

three-year suspension from the practice of law. The order of suspension, by fixing a three-year term of suspension, created an expectancy that at the expiration of three years appellant would be entitled to pursue his reinstatement and a promise that his reinstatement application would be acted on with due expediency.

Yet, in the instant case, after having been granted leave to file his reinstatement application, and after having filed it, appellant was effectively suspended anew for the reason that new charges were being first investigated, then preferred, and finally, adjudicated. From the time action was first deferred on his reinstatement application until the new charges were heard and determined, appellant was denied the right to practice law for a period of approximately three and one-half years, without any hearing of any kind. In effect, his suspension was

continued indefinitely.

From the time the appellee filed its sua sponte complaint against appellant until it applied to the Appellate Division for leave to institute and prosecute formal disciplinary proceedings, more than four months passed. It took more than an additional four months after leave to proceed was granted for the appellee to file and serve its petition and charges. During that period of approximately nine months, it appears that no probable cause determination was made; certainly appellant was never given notice and an opportunity to be heard in connection with any probable cause determination as may have been made. Yet, during that entire nine-month period appellant was suspended from the practice of law, notwithstanding that the three-year period of the prior suspension had expired.

There are two points at which some preliminary determination could have been made:

(a) by the appellee Grievance Committee, prior to seeking leave to institute formal proceedings (see, 22 NYCRR §691.4(e)); and (b) by the Appellate Division, in granting the Grievance Committee leave to institute and prosecute formal disciplinary proceedings. As to the first, appellant was never afforded an opportunity to be heard by the Grievance Committee, although he sought that opportunity. As to the second, he was not provided with notice of the Grievance Committee's application to the Appellate Division for leave to proceed. Further, the Appellate Division granted leave to the Grievance Committee to prosecute appellant on charges set forth in its application to that court". . . and on any other charges of professional misconduct . . . which may come to the Committee's attention." See, Appendix p. 88a. Since appellant has been denied access to the application by

the Grievance Committee, and to its "Report," he has been deprived of the means to support an effective challenge to that procedure, if it indeed purports to be a "probable cause" mechanism.

Appellant's due process right to a prior hearing flows from such cases as Bell v. Burson, 402 U.S. 535 (1971). His right to a prompt hearing is supported by Barry v. Barchi, 443 U.S. 55 (1979). Surely, Judiciary Law §90 and 22 NYCRR §691 have been applied in an unconstitutional manner, contrary to principles clearly established by prior rulings of this Court.

This appeal also presents substantial questions of procedural due process not previously determined by the Court. In Armstrong v. Manzo, 380 U.S. 545, 552 (1965), the Court stated that when property is taken by the state, a due process hearing must be furnished " . . .

at a meaningful time and in a meaningful manner." Appellant contends that the New York statute and Second Department regulations applicable to attorney discipline cases are unconstitutional in that attorneys are not guaranteed that a hearing will be conducted in a meaningful manner. Appellant asserts that he was denied the hearing required by due process for the reasons, inter alia, that:

--the charges failed to give adequate notice of the alleged misconduct so as to permit him to prepare to meet, confront and rebut adverse evidence and to prepare his defense;

--the inadequate notice was compounded by the denial of all pre-hearing disclosure and vacatur of his demand for a bill of particulars;

--the absence of disclosure was compounded by the limitation and denial

of requested trial subpoenae*;

--the inadequacies of the hearing were compounded by the denial of appellant's motion to remit to the Special Referee for findings of fact and conclusions of law;

--the absence of findings of fact and conclusions of law was compounded by the denial by the Appellate Division of appellant's request for oral argument before that court;

--the foregoing inadequacies were compounded by application of the "preponderance of the evidence" standard of proof and by the absence of an appeal as of right on errors of fact and plain

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*Among the matters sought by appellant, but denied him, both in pre-trial disclosure and by trial subpoena was exculpatory information contained in the file of appellee, the prosecuting body. Appellee never denied the existence of exculpatory information. No such information was disclosed or required to be disclosed. Cf. Brady v. State of Maryland, 373 U.S. 83 (1963).

(non-constitutional) errors of law.

The Court has not ruled on any of these questions in the context of attorney discipline proceedings. Yet these are issues of considerable public importance and of especial importance to members of the bar.*

D. Responding to Appellee's Brief

As stated supra, appellee does not assert that the Court is without jurisdiction of this appeal pursuant to 28 U.S.C. §1257(2). Rather, appellee appears to argue that some of appellant's due process and equal protection challenges are without merit. It is significant to note, however, that appellee cites no decision of this Court

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*There are approximately 70,000 lawyers in New York State. ABA Standing Committee on Professional Discipline, Evaluation of the Lawyer Disciplinary System of the State of New York (Final Report, December, 1982), p.5.

which forecloses any of appellant's constitutional arguments.

Appellee does rely extensively on Gerzof v. Gulotta, 87 Misc. 2d 768, 386 N.Y.S. 2d 790 (Sup. Ct. Nassau 1976) affd. on other grnds. 57 A.D. 2d 821, 395 N.Y.S. 2d 26 (1st Dept. 1977), app. dism. 42 N.Y. 2d 960, 398 N.Y.S. 2d 146 (1977), a case which it cites as "40 N.Y. 2d 825, 386 N.Y.S. 2d 790, 87 Misc. 2d 768." Appellee's Brief, p. 5. On pages 6-8 and 10-11 of its Brief, appellee purports to quote extensively the "holdings" of that case. We must point out to the Court that appellee's quotations are of the "headnote" material contained in the unofficial report of a lower court decision, although from appellee's citation it would appear that the New York Court of Appeals was being quoted. The ruling of the lower court in Gerzof v. Gullotta, supra, was affirmed, but on

other grounds than those referred to by appellee. See 57 A.D. 2d 821.

Finally, in Point D of appellee's brief, appellee urges that this appeal be rejected under the abstention doctrine established in Younger v. Harris, 401 U.S. 37 (1971), also citing Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982).

It is obvious that appellee's argument is misplaced. Younger abstention is a doctrine which militates against federal court interference with pending state proceedings. Here, jurisdiction of the Court is being invoked on appeal. The New York state courts have had an ample opportunity to consider appellant's constitutional arguments, but have rejected them if only by their silence. As the Court has responded to a similar argument:

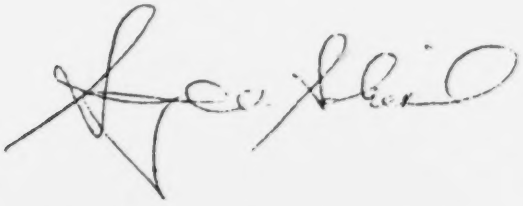
> "Virginia undoubtedly has broad powers to regulate the practice of law within its borders; but we have had occasion in the past to recognize that in regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution."
>
> Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 6 (1964) (footnote omitted).

CONCLUSION

For the reasons set forth herein and in Appellant's Jurisdictional Statement, the Court should deny appellee's "motion to dismiss" and should take jurisdiction of this appeal, direct the submission of briefs and schedule the case for oral argument. Alternatively, it is respectfully requested that the Court treat appellant's papers herein as a

petition for a writ of certiorari and grant the writ.

Respectfully submitted,



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